

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1810**

ITW Food Equipment Group LLC, a/k/a Hobart,
Relator,

vs.

Minnesota Plumbing Board,
Respondent.

**Filed July 1, 2019
Affirmed
Cleary, Chief Judge**

Minnesota State Plumbing Board
File No. PB0098

Scott M. Rusert, David J. Warden, Nilan Johnson Lewis PA, Minneapolis, Minnesota (for relator)

Keith Ellison, Attorney General, Christopher M. Kaisershot, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Bjorkman, Judge.

S Y L L A B U S

A final interpretation of the Minnesota Plumbing Code issued by the Minnesota Plumbing Board pursuant to Minn. Stat. § 326B.127, subd. 5 (2018), is subject to certiorari review by the court of appeals in the manner provided by Minn. Stat. § 14.69 (2018).

OPINION

CLEARY, Chief Judge

This is an appeal from a final interpretation of the Minnesota Plumbing Code issued by respondent Minnesota Plumbing Board (the board) under Minn. Stat. § 326B.127, subd. 5 (2018). The board interpreted Minn. R. 4714.0603.2 (2017) and Table 603.2¹ to prohibit any valve from being installed downstream of an atmospheric vacuum breaker (AVB). Relator ITW Food Equipment Group LLC, a/k/a Hobart (ITW FEG), initiated a certiorari appeal challenging the board's final interpretation, arguing that the board's decision is flawed due to an error of law, arbitrary and capricious, unsupported by substantial evidence, and based on unlawful procedure. We affirm.

FACTS

ITW FEG manufactures commercial food equipment, including dishwashers, for institutional use. In 2008, ITW FEG began selling its CLe series commercial conveyor dishwasher, and in 2017, it released its updated CLeN series. In August 2018, Minnesota Department of Labor and Industry (DOLI) inspectors denied approval of at least four of ITW FEG's CLeN dishwashers that were installed in Minnesota public schools, stating that

¹ Table 603.2 refers to Table 603.2 as found in the 2012 edition of the Uniform Plumbing Code (UPC). This table does not appear directly in the Minnesota Rules as published by the Revisor of Statutes, but is incorporated by reference. Minn. R. 4714.0050 (2017) ("Chapters 2 to 11, 14, and 17 of the 2012 edition of the Uniform Plumbing Code (UPC) as promulgated by the International Association of Plumbing and Mechanical Officials . . . are incorporated by reference and made part of the Minnesota Plumbing Code except as qualified by the applicable provisions in [Minn. R. 1300.0010 to .0250,] and as amended in this chapter."); *see also* Minn. R. 4714.0603.2 ("UPC table 603.2 is not amended."). Because there are other relevant sections of the UPC that are incorporated, but do not appear directly in the Minnesota Rules, we cite to the UPC throughout this opinion.

the dishwashers failed to comply with Minn. R. 4714.0603.2 and the Minnesota Plumbing Code's backflow-prevention provisions because the CLeN model contained a valve downstream from an AVB.

On September 5, 2018, ITW FEG submitted a request to the board for final interpretation, citing for review Minn. R. 4714.0603.2. In its request for interpretation, ITW FEG asserted that the CLeN dishwasher design complies with the Minnesota Plumbing Code because: (1) the design does not include a valve downstream that would affect the AVB; (2) the language in Table 603.2 that prohibits the installation of valves downstream from an AVB "is made in reference to the table header and is not intended to be [an enforceable criterion], but rather general guidance"; and (3) when properly installed, there is no reasonable risk for back pressure or backsiphonage, "thereby complying with the intent of the rule and negating [the DOLI inspector's] suggestion of adding additional back flow prevention, upstream and external from the listed appliance." ITW FEG further stated that, under Minn. R. 4714.0603.2, "[v]alves that control the AVB are not allowed downstream from the AVB. Other valves - are just fine."

On October 8, 2018, the board convened a special meeting and considered ITW FEG's request for interpretation. During the meeting, an ITW FEG engineer presented the design of the CLeN dishwasher to the board, and during his presentation, he showed the board a valve downstream from the AVB, stating that it was not a control valve, but a supplementary fill valve. The engineer also argued that because the AVB is always open to atmosphere, the design meets the intent of the plumbing code. A representative for ITW FEG was also present during the meeting, and while participating in the discussion with

board members, he stated, “So, in any event, we’re hoping that the Board can understand what the risk factor is here and read the code and understand what the intent was, as opposed to just the letter. It’s the intent that matters in the code.” The board disagreed and, in a nine-to-one vote, determined that, pursuant to Table 603.2, “no valves are allowed downstream of an atmospheric vacuum breaker (AVB), in accordance with ASSE 1001-2008.” This certiorari appeal follows.

ISSUES

- I. What is the proper standard of review on appeal from a final interpretation issued by the Minnesota Plumbing Board under Minn. Stat. § 326B.127, subd. 5?
- II. Was the board’s final interpretation of Minn. R. 4714.0603.2 and Table 603.2 to prohibit valves from being installed downstream of an AVB affected by an error of law?
- III. Was the board’s final interpretation arbitrary and capricious?
- IV. Was the board’s final interpretation unsupported by substantial evidence?
- V. Was the board’s final interpretation based on unlawful procedure, violating ITW FEG’s procedural-due-process rights?

ANALYSIS

I.

The Minnesota Plumbing Board is the state entity with the “final interpretative authority applicable to the State Plumbing Code and [it] shall review requests for final interpretation made to the board that relate to the State Plumbing Code.” Minn. Stat. § 326B.127, subd. 5; *see also* Minn. Stat. § 326B.435, subd. 2(a)(4) (2018) (providing that the board has the power to “review requests for final interpretations and issue final interpretations” as provided in Minn. Stat. § 326B.127, subd. 5).

Because the appellate courts have not previously been asked to review a final interpretation issued pursuant to Minn. Stat. § 326B.127, subd. 5, the question of the standard of review to be applied is one of first impression. Minn. Stat. § 326B.127, subd. 5, merely states that “[a]ny person aggrieved by a final interpretation may appeal the interpretation within 30 days of its issuance by . . . the [plumbing] board in accordance with chapter 14.” While the statute does not specify that an appeal from a final interpretation by the plumbing board may be reviewed by the court of appeals, any person aggrieved by a state agency’s final decision is entitled to judicial review by this court under Minn. Stat. § 14.63 (2018). And appellate review of a final interpretation is governed by the Minnesota Administrative Procedure Act, Minn. Stat. §§ 14.001-.69 (2018). Minn. Stat. § 326B.127, subd. 5. Accordingly, a reviewing court may reverse an administrative agency’s decision only if the decision violates a constitutional provision, is outside the statutory authority or jurisdiction of the agency, is based on unlawful procedures, reflects an error of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 14.69 (2018). Agency decisions are presumed to be correct; the party seeking review of an agency decision has the burden of establishing that the decision violates provisions of Minn. Stat. § 14.69. *In re Molnar*, 720 N.W.2d 604, 610 (Minn. App. 2006).

II.

ITW FEG first argues that the board’s final interpretation of Minn. R. 4717.0603.2 and Table 603.2 is affected by an error of law. “The interpretation of an administrative regulation presents a question of law that we review de novo.” *J.D. Donovan, Inc. v. Minn. Dep’t of Transp.*, 878 N.W.2d 1, 5 (Minn. 2016); see also *Citizens Advocating Responsible*

Dev. v. Kandiyohi Cty. Bd. of Comm'rs, 713 N.W.2d 817, 828 n.9 (Minn. 2006) (CARD) (noting that administrative regulations are governed by the same rules of construction that apply to statutes).

“Our first task is to determine whether the language of the rule is ambiguous.” *J.D. Donovan, Inc.*, 878 N.W.2d at 5. A rule is ambiguous “if it is unclear or reasonably susceptible to more than one reasonable interpretation.” *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 517 (Minn. 2007). Our determination of whether words or phrases are ambiguous does not depend on a reading of words or phrases in isolation, “but relies on the meaning assigned to the words or phrases in accordance with the apparent purpose of the regulation as a whole.” *Id.*; see also *Troyer v. Vertlu Mgmt. Co./Kok & Lundberg Funeral Homes*, 806 N.W.2d 17, 24 (Minn. 2011) (explaining that we “construe rules as a whole and words and sentences are understood . . . in the light of their context” (quotation omitted)). If the rule is not ambiguous, “we construe the rule according to the common and approved usage of its words and phrases and do not disregard the rule’s plain meaning to pursue its spirit.” *Troyer*, 806 N.W.2d at 24.

The Minnesota Plumbing Code “prescribe[s] minimum standards which shall be uniform and which shall be effective for all new plumbing installations performed anywhere in the state, including additions, extensions, alterations, and replacements.” Minn. Stat. § 326B.43, subd. 1 (2018). The plumbing code requires that the water supply connection to a commercial dishwashing machine be protected by an air gap or a backflow-prevention device. Unif. Plumbing Code § 414.2 (Int’l Ass’n of Plumbing & Mech.

Officials 2012). An AVB is one such backflow-prevention device, which prevents the “flow of water or other liquids into the distributing pipes of a potable supply of water from sources other than its intended source.” Unif. Plumbing Code § 603.3.2 (listing AVB as backflow-prevention device), 204.0 (defining backflow). Minn. R. 4714.0603.2, in turn, states that “[b]ackflow prevention devices and assemblies shall comply with Table 603.2.” And Table 603.2 explicitly directs that in the installation of an AVB, there are to be “[n]o valve[s] downstream.”

ITW FEG maintains that ASSE 1001,² referenced as an “applicable standard” in Table 603.2, governs Table 603.2 and unambiguously prohibits only control valves downstream from an AVB.³ But while the ASSE 1001 prohibition of valves downstream of an AVB refers only to control valves, its foreword also cautions that “[c]ompliance with this standard does not imply acceptance by any code body” and recommends installation consistent with local codes. Moreover, ASSE 1001 is one of many “referenced standards” included in the Minnesota Plumbing Code, which are “intended for use in the design,

² ASSE refers to standards developed by the American Society of Sanitary Engineering.

³ The board asserts that ITW FEG forfeited its arguments that (a) ASSE 1001 permits non-control valves downstream of an AVB, and (b) ASSE 1001 is the governing standard by failing to raise them below. The general rule that matters not raised below are not addressed on appeal extends to appeals from administrative decisions. *In re Z.K.*, 695 N.W.2d 656, 662 (Minn. App. 2005). In its written submissions and arguments to the board, ITW FEG maintained that the control valve in its design is permitted to be upstream from the AVB pursuant to ASSE 1001; under Minn. R. 4714.0603.2 and Table 603.2, only control valves are prohibited from being installed downstream of an AVB; and the design complies with ASSE 1001 because the valve downstream of the AVB is not a control valve. While ITW FEG did not explicitly argue that ASSE 1001 supersedes Table 603.2 as it now does on appeal, its arguments to the board reasonably suggest that its position was that ASSE 1001 should control over the language in Table 603.2. Because ITW FEG adequately raised these arguments before the board, they are not forfeited.

testing, and installation of materials, devices, appliances, and equipment regulated by this code.” Unif. Plumbing Code § 1401.1; see Minn. R. 4714.1401 (2017) (amending Table 1401.1 of the UPC). ASSE 1001 also provides guidance for other performance requirements in installing AVB devices. And although this specific ASSE 1001 performance requirement provides that AVBs are to be installed downstream of the last control valve, the plain language of Table 603.2 imposes an additional installation requirement that no valves are to be installed downstream. The language contained in Table 603.2 unambiguously prohibits valves from being installed downstream of an AVB. The board did not legally err in its final interpretation of Minn. R. 4714.0603.2.

III.

ITW FEG further challenges the board’s final interpretation as arbitrary and capricious. “[A]n agency ruling is arbitrary and capricious if the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.” *CARD*, 713 N.W.2d at 832. An agency’s decision is arbitrary and capricious when it represents the agency’s will, rather than its judgment. *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 753 (Minn. App. 2003).

At oral argument, ITW FEG relied on *CARD* to support its assertion that the board’s final interpretation was arbitrary and capricious. 713 N.W.2d 817. In *CARD*, an environmental-advocacy group brought a declaratory-judgment action challenging a county’s determination that an environmental-impact statement was not necessary for two

proposed gravel pit projects. *Id.* at 821. The supreme court concluded that the county's determination was arbitrary and capricious because the county did not appropriately consider the cumulative potential effects of related or anticipated future projects, as required under Minn. R. 4410.1700 (2005). *Id.* at 836-38. In contrast, Minn. Stat. § 326B.127, subd. 5, does not require that the board consider anything other than the plumbing code in rendering its final interpretation. Accordingly, ITW FEG's comparison to *CARD* is not instructive.

ITW FEG further asserts that the board's decision was arbitrary and capricious because it failed to consider the express language of ASSE 1001. ITW FEG also contends that the board chair and legal counsel failed to seriously consider its request for interpretation and imposed their will on the board. In addition, ITW FEG claims that the board's final interpretation is flawed because it refused to explain why the board rejected the same design that it had approved for the past ten years.

But ITW FEG's argument ignores the explicit directive in Table 603.2 that no valves are to be installed downstream of an AVB. The board considered ITW FEG's written submissions and oral presentation, urging that its design complies with ASSE 1001 and the intent of the plumbing code. But the board determined that the language in Table 603.2 prohibits any valves from being installed downstream of an AVB, despite the code's reference to ASSE 1001. Moreover, the transcript from the special meeting reflects that the board chair and legal counsel considered the language of Table 603.2 to be clear. Rather than imposing their will upon the board, they redirected the discussion back to the issue before the board—the interpretation of Minn. R. 4714.0603.2 and Table 603.2. And

the fact that ITW FEG’s previous products may have received approval is unpersuasive given that the board does not have the authority to approve products.⁴ Although we conclude on this record that the board’s final interpretation was not arbitrary and capricious, we suggest that the board conduct its future proceedings in a more structured manner and provide a more detailed analysis to support its final interpretations. But we defer to the board as the “final interpretive authority” of the plumbing code. Minn. Stat. § 326B.127, subd. 5. Because the board’s final interpretation of Minn. R. 4714.0603.2 is supported by the plain language of Table 603.2, it is not arbitrary and capricious.

IV.

ITW FEG further contends that the board’s final interpretation is contrary to substantial evidence. Specifically, ITW FEG argues that the board failed to consider ASSE 1001, ITW FEG’s explanation that the plumbing code allows for non-control valves to be installed downstream of an AVB, its demonstration that its CLeN series dishwasher complies with the plumbing code, and opinion letters from other organizations stating that ITW FEG’s design complies with ASSE 1001.

“While we review legal questions de novo, we review factual determinations made within the scope of the agency’s statutory authority under the substantial evidence standard.” *In re Application of Minn. Power for Auth. to Increase Rates for Elec. Serv. in Minn.*, 838 N.W.2d 747, 757 (Minn. 2013). “Substantial evidence is defined as (1) such

⁴ While the board has the authority to “review requests for final interpretations and issue final interpretations,” Minn. Stat. § 326B.435, subd. 2(a)(4), the DOLI “shall administer and enforce the provisions . . . and any rules promulgated” by the plumbing board, Minn. Stat. § 326B.435, subd. 2(a).

relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Cannon v. Minneapolis Police Dep’t*, 783 N.W.2d 182, 189 (Minn. App. 2010) (quotation omitted).

But in this case, the board did not engage in factfinding. Despite ITW FEG’s argument that its CLeN design complies with the plumbing code, the narrow issue before the board presented a question of law as to whether Minn. R. 4714.0603.2 and Table 603.2 permit valves of any kind to be installed downstream of an AVB. See Minn. Stat. § 326B.127, subd. 5 (stating that the plumbing board “shall review requests for final interpretation made to the board that relate to the State Plumbing Code”). Because the issue before the board was a question of law, ITW FEG’s argument that the board’s final interpretation is contrary to substantial evidence is unconvincing and better addressed under other bases for reversal as provided in Minn. Stat. § 14.69. The board’s final interpretation is not contrary to substantial evidence.

V.

Lastly, ITW FEG contends that the board based its decision on unlawful procedure. The United States and Minnesota Constitutions guarantee the due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 7. Whether the government has violated a person’s procedural-due-process rights is a question of law that this court reviews de novo. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). This court conducts “a two-step analysis to determine whether the government has violated an individual’s procedural due process rights.” *Id.* The first step is to “identify whether the government

has deprived the individual of a protected life, liberty, or property interest.” *Id.* If no such interest is deprived, then no process is due. *Id.* If a protected interest has been deprived, then the second step is to determine “whether the procedures followed by the government were constitutionally sufficient.” *Id.* (quotation omitted). To determine the constitutional adequacy of specific procedures, the Supreme Court of the United States established a three-factor balancing test in *Mathews v. Eldridge*, which requires us to consider:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). In other words, if a protected life, liberty, or property interest is at stake, “we must weigh the *Mathews* factors to determine what type of process is constitutionally due to a person deprived of such an interest.” *Sawh*, 823 N.W.2d at 632. The procedures afforded by the government must provide an individual with notice and an “opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews*, 424 U.S. at 333, 96 S. Ct. at 902 (quotation omitted).

The first step in the analysis is to determine whether the board deprived ITW FEG of any protected life, liberty, or property interest. When the board interpreted Minn. R. 4714.0603.2 to prohibit valves from being installed downstream of an AVB, it did not deprive ITW FEG of anything, much less a protected property interest. While ITW FEG argues that the “matter has been riddled with procedural missteps,” it fails to identify any protected interest, other than in its reply brief where ITW FEG argues that the board’s

alleged procedural errors have prejudiced its “right to sell and warranty dishwashers as it has in Minnesota for more than a decade.”

ITW FEG’s argument skirts the first step of the procedural-due-process analysis, which requires the government to provide constitutionally sufficient process only when the government has the ability to deprive an individual of a protected interest. Instead, the crux of ITW FEG’s argument centers on the consequences of the final interpretation, in that the CLeN design may continue to be flagged by DOLI inspectors, thereby risking the dishwasher’s certification and warrantied use, unless ITW FEG alters its design. But “procedural due process protections do not apply when government action may lead to the deprivation of a protected interest at some indeterminate point in the future based on certain unfulfilled conditions.” *Sawh*, 823 N.W.2d at 633 (emphasis omitted); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1972) (“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.”); *State, Dep’t of Pub. Safety v. Elk River Ready Mix Co.*, 430 N.W.2d 261, 264 (Minn. App. 1988) (holding that due process did not require the defendant to receive notice that overweight vehicle violations could subject him to civil liability because there was no deprivation of property). Because the board’s final interpretation did not, and could not, result in approval or disapproval of ITW FEG’s CLeN design, ITW FEG did not have a property interest at risk of deprivation.

Even if the threshold protected-property-interest requirement were met, we would conclude that the board’s procedure did not violate ITW FEG’s due-process rights. The board is not required to hold an evidentiary hearing when reviewing a party’s request for a

final interpretation. See Minn. Stat. § 326B.127, subd. 5. Moreover, ITW FEG received notice of the board’s special meeting to consider ITW FEG’s request for interpretation, and the board further allowed ITW FEG to file written submissions to the board, and supplement those submissions, for consideration during the special meeting. At the start of the special meeting, the board allowed ITW FEG to give a brief presentation and also permitted its representatives to interject throughout the board’s discussion. The board provided ITW FEG with the basic requisites of due process, “notice and the opportunity to be heard,” even when its property interest was not at stake. See *Sisson v. Triplett*, 428 N.W.2d 565, 568 (Minn. 1988). The board did not deprive ITW FEG of any protected constitutional interest when it interpreted the plumbing code in response to ITW FEG’s request for interpretation.

D E C I S I O N

A final interpretation of the plumbing code issued by the plumbing board pursuant to Minn. Stat. § 326B.127, subd. 5, is subject to certiorari review by this court in the manner provided by Minn. Stat. § 14.69. Minn. R. 4714.0603.2 and Table 603.2 unambiguously prohibit any valve from being installed downstream of an AVB. Because the board’s final interpretation of Minn. R. 4714.0603.2 was based upon the plain language of Table 603.2, it was not legally erroneous, arbitrary and capricious, or unsupported by substantial evidence. The board did not deprive ITW FEG of any protected constitutional interest when it issued a final interpretation of Minn. R. 4714.0603.2 in response to ITW FEG’s request.

Affirmed.